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No. 97-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

JERRY VERNON,
Petitioner,

v.

JOE WILLIAMS, WARDEN,
CENTRAL NEW MEXICO CORRECTIONAL FACILITY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SECOND JUDICIAL DISTRICT COURT OF NEW MEXICO

PETITION FOR WRIT OF CERTIORARI

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24 pp

QUESTION PRESENTED

Whether the Due Process Clause of the United States Constitution is violated when the trial court fails to instruct the jury in a criminal trial in New Mexico that once a defendant offers evidence he acted in self-defense unlawfulness becomes a necessary element of the offense of murder and the State has the burden of proof of proving beyond a reasonable doubt that he did not act in self-defense?

PARTIES TO THE PROCEEDINGS BELOW

The petitioner was represented below by Gary W. Nelson, Post Office Box 1092, Albuquerque, New Mexico 87102. The other party below was the State of New Mexico, represented by Joel Jacobsen, Assistant Attorney General, Post Office Drawer 1508, Santa Fe, New Mexico 87504-1508, and Sam Bregman, Assistant District Attorney, Second Judicial District, 111 Union Square S.E., Albuquerque, New Mexico 87102.

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CONSTITUTIONAL PROVISIONS:

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OPINIONS BELOW

The order of the Second Judicial District Court denying the petition for writ of habeas corpus is unreported, ***Vernon v. State***, No. CR-89-01146 (Order, Second Judicial District Court 5-30-97) and is reproduced in the Appendix at App. 1. The order of the New Mexico Supreme Court denying the petition for writ of certiorari to the Second Judicial District Court is unreported, ***Vernon v. Williams***, No. 24,468 (N.M. S.Ct. 7-24-97) and is reproduced in the Appendix at App. 3.

JURISDICTION

The judgment to be reviewed is that of the Second Judicial District Court of the State of New Mexico, dated May 30, 1997. A petition to the New Mexico Supreme Court for writ of certiorari to the Second Judicial District Court of the State of New Mexico was denied on July 24, 1997. Jurisdiction is conferred on this Court by 28 U.S.C. Section 1257 and Rule 10.1 (b) & (c) of the Supreme Court Rules.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution amendment V:

> No person shall . . .be deprived of his life, liberty, or property, without due process of law . . .

United States Constitution amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . .

United States Constitution amendment XIV:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Was It Murder or Self-Defense?

Jerry Vernon was arrested, tried and convicted for killing Larry Stevens in Albuquerque, New Mexico. Mr. Vernon and Larry Stevens had been acquainted for some time prior to Steven's death. Shortly before the death of Larry Stevens, Mr. Vernon became convinced that Larry Stevens had been paid by others to kill Mr. Vernon. On June 20, 1989, Mr. Vernon, Larry Stevens and Sharman Sategna drove to an area located in northeastern Albuquerque. An argument ensued and Mr. Vernon testified that Larry Stevens admitted that he had been hired to kill Mr. Vernon. During the argument, according to Mr. Vernon, Larry Stevens swung his kubotan and hit Mr. Vernon with a slashing blow. Stevens then made a break for a shotgun and Mr. Vernon raced him back to the shotgun. According to Mr. Vernon, they grabbed the shotgun simultaneously. Both men were jerking on the gun and Stevens was simultaneously swatting at Mr. Vernon with the kubotan. Mr. Vernon testified that he pulled the trigger at some point, both barrels discharging and striking Stevens. Mr. Vernon repeatedly testified that he acted in self-defense after learning that Stevens had entered into a contract with others to kill him and after Stevens began striking him with the kubotan.

Sharman Sategna was also present at the scene when Larry Stevens was killed. Her testimony was different from Mr. Vernon's. She said that Stevens and Vernon had been arguing for quite sometime that night and she had been instructed by both of them to drive to various locations. Eventually, she was ordered to stop in a location just north of the Albuquerque, New Mexico city limits. She stopped the vehicle and turned off the lights. She testified that she got out of the vehicle's driver-side door and walked around to the

passenger side. Vernon was standing beside the passenger door. Stevens was standing near him. She testified that Vernon had the kubotan, which he apparently had taken from Stevens. She also saw a shotgun next to the vehicle. Vernon and Stevens then walked away from the vehicle with Vernon carrying the shotgun. Shortly afterwards, she heard two shots. Vernon came back to the vehicle and told her "It was either him or me."

The Defective Jury Instructions

Based on Mr. Vernon's testimony, the trial judge instructed the jury in accordance with the then existing New Mexico Uniform Jury Instructions regarding self-defense.[1] The

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[1] Instruction No. 25 stated:

Evidence has been presented that the defendant killed Larry Stevens while defending himself.

The killing is in self-defense if:

1. There was an appearance of immediate danger of death or great bodily harm to the defendant as a result of the actions of Larry Stevens; and

2. The defendant was in fact put in fear by the apparant [sic] danger of immediate death or great bodily harm and killed Larry Stevens because of that fear; and

3. A reasonable person in the same circumstances as the defendant would have acted as the defendant did.

In considering this defense, and after considering all the evidence in this case, if you have a reasonable doubt as to the defendant's guilt, you must find him not guilty.

Instruction No. 26 stated:

judge did not instruct the jury on whether the defendant or the state was required to carry the burden of proof once evidence of self-defense was presented or what the burden of proof would be once evidence of self-defense was presented at trial.

The jury ultimately convicted Mr. Vernon of first degree murder and kidnapping. Mr. Vernon appealed his convictions of first degree murder and kidnapping. The kidnapping conviction was later reversed and the murder conviction affirmed by the New Mexico Supreme Court. ***State v. Vernon***, 116 N.M. 737, 867 P.2d 407 (1993). Mr. Vernon is presently imprisoned pursuant to a life sentence for the murder conviction.

The self-defense jury instructions used in Mr. Vernon's case were contained in the New Mexico Uniform Jury Instructions. Subsequent to Mr. Vernon's conviction, and after his appeal had become final, the New Mexico Supreme Court decided ***State v. Parrish***, 118 N.M. 39, 878 P.2d 988 (1994). In ***Parrish***, the court found that New Mexico's self-defense jury instructions were fundamentally flawed because of the inadvertent omission of the element of unlawfulness and the omission of a burden of proof instruction detailing the requirement that once a defendant presents evidence that he acted in self-defense, the government bears the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense. Following ***Parrish***, New Mexico's Uniform Jury Instructions were modified so as to cure these constitutional deficiencies.

Exhaustion of Claims in State Court

A person who is threatened with an attack need no retreat. In the exercise of his right of self-defense, he may stand his ground and defend himself.

On August 1, 1995, Mr. Vernon filed a Petition for Writ of Habeas Corpus in the Second Judicial District Court seeking to vacate and set aside his conviction on the grounds, *inter alia*, that his trial counsel provided him with ineffective assistance of counsel. On February 16, 1997, the Hon. Richard Knowles, Second Judicial District Court Judge, denied the Petition. On March 5, 1996, Mr. Vernon filed a Petition for Writ of Certiorari with the New Mexico Supreme Court. On March 21, 1996, the New Mexico Supreme Court denied the Petition.

On April 4, 1997, petitioner filed in the Second Judicial District Court for the State of New Mexico a Petition for Writ of Habeas Corpus. Petitioner argued that pursuant to ***State v. Parish***, 118 N.M. 39, 878 P.2d 988 (1994)[2], he was entitled to a new trial because the district court in his original trial failed to instruct the jury on an essential element regarding self-defense. Petitioner also argued that at trial the district court had failed to instruct the jury that the government had the burden of proving that the defendant did not act in self-defense once the defendant presented evidence that he acted in self-defense.

The government argued, *inter alia*, in response that Vernon was barred from raising the ***Parrish*** issue because he had failed to raise it at trial, on appeal, or in his first habeas corpus proceeding; that the New Mexico Supreme Court had already decided the issue in petitioner's original appeal; and that the ***Parrish*** decision did not require that a jury hearing a first degree murder case be instructed that "unlawfulness" was an element of the offense when self-defense was raised or that the

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[2] Petitioner also based his claims on his right to due process and a fair trial pursuant to the United States Constitution, specifically, the Fifth, Sixth and Fourteenth Amendments and Article II, Sections 14, 15 and 18 of the New Mexico Constitution. The Petitioner also relied on ***In re Winship***, 397 U.S. 358 (1970), and other federal case law.

government had the "burden of proof" in proving that the defendant did not act in self-defense once the defendant presented evidence of self-defense.

The petitioner filed a reply to the response. The District Court, Hon. Richard Knowles presiding, did not conduct an evidentiary hearing. Instead the judge issued an order stating:

> The petition is denied as I find the arguments presented by Respondent to be persuasive. No evidentiary hearing is necessary. Having reviewed Petitioner's Reply, I note that I have read the entire transcript in this matter. While I believe there to be no error, any error was harmless beyond a reasonable doubt.

Order, Hon. Richard Knowles, District Court Judge, Second Judicial District, dated May 30, 1997.

Mr. Vernon then filed with the New Mexico Supreme Court a Petition for Writ of Certiorari to the District Court from the denial of the habeas corpus raising the same claims presented in the habeas petition. The Petition for Writ of Certiorari was denied on July 24, 1997.

REASONS FOR GRANTING THE WRIT

1. The Trial Judge Committed Fundamental Error And Violated Mr. Vernon's Due Process Rights By Failing To Instruct The Jury That Unlawfulness Is A Necessary Element Of The Offense And That The State Had The Burden Of Proving That Mr. Vernon Did Not Act In Self-Defense.

A. The jury in Mr. Vernon's case was never told that the state had the burden of proving that Mr. Vernon did not act in self-defense.

This Court should issue a writ of certiorari to the Second Judicial District Court of the State of New Mexico because Jerry Vernon, after having introduced evidence that he acted in self-defense in the killing of a person who he believed had been hired to kill him,[3] was convicted by a jury that had never been instructed that the state had the burden of proof in a case involving self-defense. Furthermore, the jury was never instructed what burden of proof the state was required to prove in order to convict Jerry Vernon. The jury never knew whether it was proof beyond a reasonable doubt, clear and convincing evidence, or by a preponderance of evidence.[4]

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[3] "The accused was entitled, so far as his right to resist the attack was concerned, to remain where he was, and to do whatever was necessary or what he had reasonable grounds to believe at the time was necessary, to save his life, or to protect himself from great bodily harm." ***Rowe v. United States***, 164 U.S. 545, 558 (1896).

[4] "[W]hile a reasonable juror might realize that the issue of self-defense requires some standard of proof, the instruction as it stands, does not explain what that standard is." ***State v. Parrish***, 118 N.M. 39, 45, 878 P.2d 988, 996 (1994).

A criminal defendant has a combined constitutional right under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution to have his guilt determined only upon proof beyond a properly instructed jury's reasonable doubt of every fact necessary to constitute the crime charged. ***Sullivan v. Louisiana***, 113 S.Ct. 2078, 2080-2081 (1994). Due process and the right to a fair trial guarantee a defendant in a criminal trial that the jury will be instructed that the government bears the burden of proof as to all elements necessary to convict him. Without such a guarantee, we cannot insure the "accused against conviction except upon proof beyond a reasonable doubt of every act necessary to constitute the crime with which he is charged." ***In re Winship.***

Mr. Vernon presented evidence that he acted in self-defense. "Self-defense is a justification to all homicides and results in acquittal rather than mitigation." ***State v. Abeyta***, 120 N.M. 233, 239, 901 P.2d 164, 170 (1995). "A defendant does not have the burden of proving that the killing was an exercise of the right of self-defense. The defendant's only obligation is to introduce evidence that will raise in the minds of the jurors a reasonable doubt about the matter." ***Parrish***, 118 N.M. 39, 45, 878 P.2d 988, 994 (1994). "[I]n New Mexico, self-defense is not an affirmative defense. The burden of proof is on the state." ***Id.***[5] "It is settled law in New Mexico that the defendant

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[5] This case differs from ***Martin v. Ohio***, 480 U.S. 228 (1987), in that the Court in ***Martin*** was concerned as to whether a defendant could be required to prove an affirmative defense by a preponderance of evidence. Ohio law authorized such a shift of the burden and the Court approved that procedure. Here, distinguishable from Ohio law, "in New Mexico, self-defense is not an affirmative defense." ***Parrish***, 118 N.M. at 45, 878 P.2d at 994. In addition, the jury instruction in the instant case was ambiguous in that the jury was not told who had the burden and what that burden was. The jury could have thought that Mr. Vernon had the burden of proof of proving beyond a reasonable doubt, by a preponderance of evidence, or by

does not have the burden of proving that the killing was an exercise of the right of self-defense." ***Parrish***, 118 N.M. at 44, 878 P.2d at 993.

Prior to 1986, the New Mexico Uniform Jury Instructions regarding self-defense explicitly shifted the burden to the state. However, the jury instructions were recompiled that year and the requirement that the state prove a defendant did not act in self-defense was inexplicably eliminated. ***Id.*** at 45-46, 878 P.2d at 994-995. The result of this change was that "a reasonable juror might not understand that the State must also disprove a defense beyond a reasonable doubt." ***Id.*** at 46, 878 P.2d at 995. In other words, the New Mexico Uniform Jury Instructions on self-defense were ambiguous because they fail to place the burden of proof on this issue either on the state or the defendant. ***Id.*** at 45, 878 P.2d at 994. A general instruction stating that the law presumes the defendant to be innocent unless and until the jury is satisfied of his guilt beyond a reasonable doubt does not cure the ambiguity created by the self-defense instruction. ***Id.***

The court in ***Parrish*** decided that the jury instructions involving self-defense and the burden of proof in a self-defense case were ambiguous and confusing. It ordered that when a case presents a self-defense issue in the future, then the jury must be properly instructed regarding the burden of proof being on the state to disprove that the defendant acted in self-defense. ***Id.*** Subsequently, the New Mexico Uniform Jury Instructions

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clear and convincing evidence that he acted in self-defense. Likewise, this case is not controlled by ***Patterson v. New York***, 432 U.S. 197 (1977), because that case is limited to the constitutionality of placing the burden of proof on a defendant to establish an affirmative defense. As noted above, self-defense is not an affirmative defense in New Mexico.

regarding self-defense were changed.[6]

Mr. Vernon presented evidence that he acted in self-defense. He was convicted following the use by the jury of the same jury instructions that were found to be defective in ***Parrish***. The trial judge at Mr. Vernon's trial had "no authority to question the validity of the uniform jury instructions because they were made 'mandatory' when the Supreme Court adopt[ed] them through a general order." ***Id.*** at 47, 878 P.2d 995. Mr. Vernon had no obligation to submit any instruction regarding the correct burden of proof because the New Mexico Supreme Court has repeatedly held that it is the trial court's duty to properly instruct the jury. ***State v. Osborne***, 111 N.M. 654, 808 P.2d 624 (1991).

The result of the use of the defective jury instructions was that the jury was not told that once Mr. Vernon introduced evidence he acted in self-defense, the burden of proof was on the state to prove that he didn't act in self-defense.[7] This problem was complicated by the fact that the jury also wasn't told that it had to find that Mr. Vernon acted unlawfully. In other words, the jury could have found that Mr. Vernon did not

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[6] Normally, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced. ***Teague v. Lane***, 489 U.S. 288 (1989). ***Teague*** is not controlling in this case because ***Parrish*** did not create a new rule. In fact, it was a mistake in the Uniform Jury Instructions that differed from long-standing New Mexico law regarding the burden of proof in self-defense cases that resulted in the ***Parrish*** problem. ***Parrish***, 118 N.M. at 44-46, 878 P.2d at 993-995.

[7] ***See, e.g., Government of Virgin Islands v. Isaac***, 50 F.3d 1175, 1179 (3d Cir. 1995) ("Once [Defendant] properly placed self-defense in issue, the government bore the burden of proving beyond a reasonable doubt that [Defendant] did not act in self-defense.")

prove that he acted in self-defense and therefore it presumed he was guilty.

B. The jury in Mr. Vernon's case was never told that unlawfulness was an essential element of the defense once Mr. Vernon presented evidence that he acted in self-defense.

Federal and state constitutional provisions regarding due process and the right to a fair trial guarantee a defendant in a criminal trial that his jury will be instructed that the government bears the burden of proof as to all elements necessary to convict him of the crime for which he is charged. Without that guarantee, we cannot insure the "accused against conviction except upon proof beyond a reasonable doubt of every act necessary to constitute the crime with which he is charged." ***In re Winship***, 397 U.S. 358 (1970).

A fair reading of the ***Parish*** decision reveals that the unlawfulness instruction must be given in all homicide cases in New Mexico once justification or excuse for the killing is raised. ***See*** N.M. Stat. Ann. 1978, Section 30-2-8 (Repl. Pamp. 1984). Mr. Vernon presented evidence of self-defense at trial.[8] Having met his burden of production regarding self-defense, the district court then instructed the jury on self-defense. It failed, however, to instruct the jury that "unlawfulness" was an element of the offense once evidence of self-defense is

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[8] "Many respectable writers agree that if a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant he may stand his ground and that if he kills him he has not succeeded the bounds of lawful self-defence." ***Brown v. United States***, 256 U.S. 335, 343 (1920).

presented. ***State v. Parish***, 118 N.M. 39, 878 P.2d 988 (1994).[9] Under ***Parrish***, "unlawfulness" is clearly an element of the offense of murder once self-defense is raised. Mr. Vernon's jury was not instructed regarding the element of "unlawfulness" and this resulted in Mr. Vernon being convicted without the jury having "proof beyond a reasonable doubt of every act necessary to constitute the crime with which he is charged." ***In re Winship***, 397 U.S. 358 (1970).

Once Mr. Vernon asserted self-defense, the district court was required to instruct the jury that it had to find that the killing of Mr. Stevens was without lawful justification or excuse. Because it was not instructed on this element of "unlawfulness", the jury could reasonably but erroneously have convicted Mr. Vernon even though it believed Mr. Vernon shot Mr. Stevens in a lawful act of self-defense.

Finally, the state cannot argue that the failure of the trial

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[9] In ***Parrish***, the New Mexico Supreme Court noted:

> The statutes providing for the defense to homicide implicitly require the state to prove the killing was unlawful, unjustifiable, or inexcusable. The statue explaining when the defendant may be acquitted states, 'Whenever any person is prosecuted for a homicide, and upon his trial the killing shall be found to have been excusable or justifiable, the jury shall find such person not guilty and he shall be discharged.' NMSA 1978, Section 30-2-8 (Repl. Pamp. 1984) (emphasis added). In the same way, the justifiable homicide statute states that '[h]omicide is justifiable when . . . in the lawful defense of himself or of another . . .' NMSA 1978, Section 30-2-7(B) (Repl. Pamp. 1984) (emphasis added). The unstated premise is that the claim of lawfulness must be rebutted by the state.

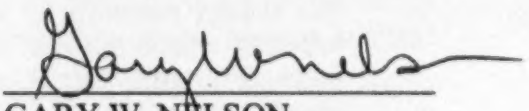
Parrish, 118 N.M. at 42-44.

court to give the essential element instruction on self-defense required by ***Parish*** was harmless error. Because the jurors were given the option of convicting Mr. Vernon without ever finding that the State had proven each and every element of the crime beyond a reasonable doubt, the error was not harmless under any standard.

CONCLUSION

Jerry Vernon has now been imprisoned for over six years. Convicted by a jury that wasn't instructed that they had to find beyond a reasonable doubt that he had acted unlawfully, an essential element, and that once he presented evidence of self-defense, the state had the burden of proving beyond a reasonable doubt that he did not act in self-defense. This Court should grant this petition for writ of certiorari and insure that Jerry Vernon receive the due process and fair trial he was entitled to under the fifth, sixth and fourteenth amendments to the United States Constitution.

Respectfully submitted,



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SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

NO. CR-89-01146

JERRY VERNON,

Petitioner,

vs.

STATE OF NEW MEXICO,

Respondent.

RE: PETITION FOR WRIT OF HABEAS CORPUS

ORDER

THIS MATTER having come before the Court on Petitioner's Petition for Writ of Habeas Corpus and/or other pleading(s) pursuant to Rule 5-802 of the Rules of Criminal Procedure for the District Courts, the Court having reviewed the record and being otherwise fully advised in the premises, FINDS AND ORDERS THAT:

(✓) The 2nd Writ / Motion for Habeas Corpus is denied.

(✓) The Petition is denied as I find the arguments presented by Respondent to be persuasive. No evidentiary hearing is necessary. Having reviewed

Petitioner's Reply, I note that I have read the entire transcript in this matter. While I believe there to be no error, any error was harmless beyond a reasonable doubt.

Signature
District Court Judge Division XV

cc: Petitioner
District Attorney
Attorney General
Public Defender

I hereby certify that a copy of this instrument was delivered to All Parties this 30th day of May, 1997.

s/ Signature

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. 24,468

JERRY VERNON,

Petitioner,

vs.

JOE WILLIAMS, Warden,

Respondent.

ORDER

This matter coming on for consideration by the court upon Petition for Writ of Certiorari filed pursuant to Rule 12-501 of the Rules of Appellate Procedure, and the Court having considered said petition, and being sufficiently advised;

NOW, THEREFORE IT IS ORDERED that the Petition for Writ of Certiorari is **denied.**

ATTEST: A True Copy
KATHLEEN J GIBSON
CLERK OF THE SUPREME COURT
By_____SIGNATURE_____